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CW 530

PETITION FOR A WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

Name Baker, Frederick L.
(Last) (First) (Initial)

Prisoner Number C-22918

Institutional Address Correctional Training Facility, P.O. Box 689, B-321, Soledad, California 93960-0689

FILED
DEC 12 2007
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FREDERICK LEE BAKER,
(Enter the full name of plaintiff in this action.)

vs.

BEN CURRY, Warden, et al.,
Correctional Training Facility;
Board of Parole Hearings.

(Enter the full name of respondent(s) or jailor in this action)

CV 07 6289 CW (PR)

Case No. _____
(To be provided by the clerk of court)

PETITION FOR A WRIT OF HABEAS CORPUS

[Related Case No. C.04-3753]

Read Comments Carefully Before Filling In

When and Where to File

You should file in the Northern District if you were convicted and sentenced in one of these counties: Alameda, Contra Costa, Del Norte, Humboldt, Lake, Marin, Mendocino, Monterey, Napa, San Benito, Santa Clara, Santa Cruz, San Francisco, San Mateo and Sonoma. You should also file in this district if you are challenging the manner in which your sentence is being executed, such as loss of good time credits, and you are confined in one of these counties. Habeas L.R. 2254-3(a).

If you are challenging your conviction or sentence and you were not convicted and sentenced in one of the above-named fifteen counties, your petition will likely be transferred to the United States District Court for the district in which the state court that convicted and sentenced you is located. If you are challenging the execution of your sentence and you are not in prison in one of these counties, your petition will likely be transferred to the district court for the district that includes the institution where you are confined. Habeas L.R. 2254-3(b).

Who to Name as Respondent

You must name the person in whose actual custody you are. This usually means the Warden or jailor. Do not name the State of California, a city, a county or the superior court of the county in which you are imprisoned or by whom you were convicted and sentenced. These are not proper respondents.

If you are not presently in custody pursuant to the state judgment against which you seek relief but may be subject to such custody in the future (e.g., detainers), you must name the person in whose custody you are now and the Attorney General of the state in which the judgment you seek to attack was entered.

A. INFORMATION ABOUT YOUR CONVICTION AND SENTENCE

1. What sentence are you challenging in this petition?

(a) Name and location of court that imposed sentence (for example; Alameda County Superior Court, Oakland):

Riverside Superior Court — Court

Riverside — Location

(b) Case number, if known CR 17643

(c) Date and terms of sentence 10/30/1980, 7 to life, + 8 yrs, 3 mos

(d) Are you now in custody serving this term? (Custody means being in jail, on parole or probation, etc.) Yes XX No ____

Where?

Name of Institution: Correctional Training Facility

Address: P.O. Box 689, B-321, Soledad, CA 93960-0689

2. For what crime were you given this sentence? (If your petition challenges a sentence for more than one crime, list each crime separately using Penal Code numbers if known. If you are challenging more than one sentence, you should file a different petition for each sentence.)

Kidnap Robebry (PC § 209(b)); Robbery (PC § 211); Vehicle Theft (VC § 10851); Grand Theft (PC § 417); Attempted Murder (PC §217); Weapons Use and Possession (PC § 12022(a)).

3. Did you have any of the following?

Arraignment: Yes XX No ____

Preliminary Hearing: Yes XX No ____

Motion to Suppress: Yes ____ No XX

4. How did you plead?

Guilty ____ Not Guilty XX Nolo Contendere ____

Any other plea (specify) N/A

5. If you went to trial, what kind of trial did you have?

Jury XX Judge alone ____ Judge alone on a transcript ____

6. Did you testify at your trial? Yes ____ No XX

7. Did you have an attorney at the following proceedings:

(a) Arraignment Yes XX No ____

(b) Preliminary hearing Yes XX No ____

(c) Time of plea Yes N/A No N/A

(d) Trial Yes XX No ____

(e) Sentencing Yes XX No ____

(f) Appeal Yes XX No ____

(g) Other post-conviction proceeding Yes ____ No XX

8. Did you appeal your conviction? Yes XX No ____

(a) If you did, to what court(s) did you appeal?

Court of Appeal Yes XX No ____

Year: 1982 Result: AFFIRMED

Supreme Court of California Yes ____ No XX

Year: N/A Result: N/A

Any other court Yes ____ No XX

Year: N/A Result: N/A

(b) If you appealed, were the grounds the same as those that you are raising in this

N/A

petition? Yes ____ No____N/A

(c) Was there an opinion? Yes ____ No____N/A

(d) Did you seek permission to file a late appeal under Rule 31(a)?

Yes ____ No____N/A

If you did, give the name of the court and the result:

N/A

9. Other than appeals, have you previously filed any petitions, applications or motions with respect to this conviction in any court, state or federal? Yes ____ No__XX

[Note: If you previously filed a petition for a writ of habeas corpus in federal court that challenged the same conviction you are challenging now and if that petition was denied or dismissed with prejudice, you must first file a motion in the United States Court of Appeals for the Ninth Circuit for an order authorizing the district court to consider this petition. You may not file a second or subsequent federal habeas petition without first obtaining such an order from the Ninth Circuit. 28 U.S.C. §§ 2244(b).]

(a) If you sought relief in any proceeding other than an appeal, answer the following questions for each proceeding. Attach extra paper if you need more space.

I. Name of Court: N/A

Type of Proceeding: N/A

Grounds raised (Be brief but specific):

a. N/A

b. N/A

c. N/A

d. N/A

Result: N/A Date of Result: N/A

II. Name of Court: N/A

Type of Proceeding: N/A

Grounds raised (Be brief but specific):

a. N/A

b. N/A

c. N/A

d. N/A

Result: N/A Date of Result: N/A

III. Name of Court: N/A

Type of Proceeding: N/A

Grounds raised (Be brief but specific):

a. N/A

b. N/A

c. N/A

d. N/A

Result: N/A Date of Result: N/A

IV. Name of Court: N/A

Type of Proceeding: N/A

Grounds raised (Be brief but specific):

a. N/A

b. N/A

c. N/A

d. N/A

Result: N/A Date of Result: N/A

(b) Is any petition, appeal or other post-conviction proceeding now pending in any court?

Yes XX No____

Name and location of court: U.S. DISTRICT COURT, CENTRAL DISTRICT (Case No: EDCV06-1323 JSL (MAN))

B. GROUNDS FOR RELIEF

State briefly every reason that you believe you are being confined unlawfully. Give facts to support each claim. For example, what legal right or privilege were you denied? What happened? Who made the error? Avoid legal arguments with numerous case citations. Attach extra paper if you

need more space. Answer the same questions for each claim.

[Note: You must present ALL your claims in your first federal habeas petition. Subsequent petitions may be dismissed without review on the merits. 28 U.S.C. §§ 2244(b); McCleskey v. Zant, 499 U.S. 467, 111 S. Ct. 1454, 113 L. Ed. 2d 517 (1991).]

Claim One: PETITIONER WAS DEPRIVED DUE PROCESS OF LAW WHEN THE STATE COURT CONCLUDED CONTRARY TO "CLEARLY ESTABLISHED" UNITED STATES SUPREME COURT PRECEDENT THAT PETITIONER HAS NO LIBERTY INTEREST IN PAROLE AND THEN DENIED PETITIONER'S CLAIM WITHOUT ANY EVIDENTIARY SUPPORT IN THE RECORD... (see p. 10 of Brief in Support of Writ attached hereto)

Supporting Facts: On June 1, 2007, the State court denied Petitioner relief, asserting that he had no due process liberty interest in being paroled because the panel's decision was a preliminary decision. (Exh. W at 6). Moreover, in spite of the record being replete with evidence to the contrary, the State court further stated that "significant portions of the hearing was unable to be transcribed." (Id. at pp. 3-5).

Claim Two: THE STATE COURT'S ADJUDICATION RESULTED IN A DECISION THAT WAS BASED ON AN UNREASONABLE DETERMINATION OF THE FACTS IN LIGHT OF THE EVIDENCE PRESENTED IN THE STATE COURT PROCEEDING. (Please see page 17 of Brief in Support of Writ attached hereto).

Supporting Facts: The State Court denied relief without requiring Respondent to file a responsive return, after it had been determined that Petitioner stated sufficient facts in both his original petition (Exh. H) and his amended/supplemental petition (Exh. P) to establish a prima facie case for relief. See Exh. W at p. 6.) Thus, depriving Petitioner of a full and fair hearing. (See Pet. Decl's (1) & (2)).

Claim Three: PETITIONER WAS DEPRIVED OF HIS FIFTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS WHEN THE BOARD DISAPPROVED AND RESCINDED ITS SEPTEMBER 24, 2004 FINDING THAT HE WAS SUITABLE FOR PAROLE BASED SOLELY ON THE FACT THAT THE BOARD LOST THE DECISION PORTION OF THE TRANSCRIPT FROM THE HEARING. (see p. 25 of Brief).

Supporting Facts: After it was determined that Petitioner had met the prerequisites to parole release, the Board during its decision review process subsequent of the hearing, overturned the the decision because its staff had failed to produce all tapes for transcription either because it lost or misplaced the "second tape." Exh(s) C & D.

If any of these grounds was not previously presented to any other court, state briefly which grounds were not presented and why:

N/A

need more space. Answer the same questions for each claim.

[Note: You must present ALL your claims in your first federal habeas petition. Subsequent petitions may be dismissed without review on the merits. 28 U.S.C. §§ 2244(b); McCleskey v. Zant, 499 U.S. 467, 111 S. Ct. 1454, 113 L. Ed. 2d 517 (1991).]

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If any of these grounds was not previously presented to any other court, state briefly which grounds were not presented and why:

N/A

List, by name and citation only, any cases that you think are close factually to yours so that they are an example of the error you believe occurred in your case. Do not discuss the holding or reasoning of these cases:

Please see ("Table of Authorities") on page iii of the Brief in Support of Writ of Habeas Corpus.

Do you have an attorney for this petition? Yes____ No__XX__

If you do, give the name and address of your attorney:

N/A

WHEREFORE, petitioner prays that the Court grant petitioner relief to which s/he may be entitled in this proceeding. I verify under penalty of perjury that the foregoing is true and correct.

Executed on 12/4/2007 [signature]

Date Signature of Petitioner

(Rev. 6/02)

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

FREDERICK LEE BAKER, Petitioner-Appellant, v. BEN CURRY, Warden, et al., Correctional Training Facility, Respondent-Appellee.	Case No: [Related Case No. C 04-3753]

BRIEF IN SUPPORT OF
PETITION FOR WRIT OF HABEAS CORPUS

Frederick L. Baker
Correctional Training Facility
Central-Facility
C-22918
P.O. Box 689, B-321
Soledad, CA 93960-0689

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

FREDERICK LEE BAKER, Petitioner-Appellant, v. BEN CURRY, Warden, et al., Correctional Training Facility, Respondent-Appellee.	Case No: [Related Case No. C 04-3753] **BRIEF IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS**

STATEMENT OF JURISDICTION

The district court has jurisdiction to decide the petition for writ of habeas corpus filed by petitioner under 28 U.S.C. § 2254. By order filed Nov. 28, 2007, the California Supreme Court denied review. See Appendix 1. That judgment is a final order that disposes of all petitioner's claims.

QUESTIONS PRESENTED FOR REVIEW

1. Was Petitioner deprived due process of law when the State court concluded contrary to "clearly established" United States Supreme Court precedent that Petitioner has no liberty interest in parole and then denied Petitioner's claims without any evidentiary support in the record tending to establish the Board of Parole Hearings' (hereafter "BPH, Board or Respondent") allegation that the decision portion of the hearing could not be transcribed?

2. Did the State Court's adjudication result in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State Court proceeding?

3. Was Petitioner deprived of his Fifth and Fourteenth Amendment rights to due process when the Board disapproved and rescinded its September 24, 2004 finding that he was suitable for parole based solely on the fact that the Board lost the decision portion of the transcript from the hearing?

STATEMENT OF THE CASE

Petitioner Fred L. Baker (hereafter "Petitioner") was convicted in Riverside County Superior Court of kidnap robbery, robbery, vehicle theft, attempted murder, grand theft, weapons use and weapons possession. He was sentenced on October 30, 1980, to seven years to life, consecutive to eight years plus three years in prison.

Petitioner's minimum eligible release date was set for July 31, 1994. On August 3, 1993, Petitioner appeared before the Board of Parole Hearings for his initial parole eligibility hearing. He was denied parole for one year. At a September 8, 1994, hearing, he was denied parole for another year. At a February 20, 1996, hearing, he was denied parole for two years. At a May 2, 1998, hearing, he was denied parole for one year.

At a May 1999, hearing, he was denied parole for two years. At an October 24, 2001, hearing, he was denied parole for one year. At an August 5, 2003, hearing, he was denied parole for one year. Finally, at a September 24, 2004, hear, Petitioner was found suitable for parole. (Exh. A.)

On September 28, 2004, Petitioner was summoned to the counselors office to sign and receive the conditions of his parole. (Exh. B.)

On November 30, 2004, after reviewing the transcript, the Decision Review Unit alleged that due to an apparent malfunction of the recording equipment, the decision portion of the hearing could not be transcribed, and recommended disapproval of the "proposed September 24, 2004 hearing decision and schedule a rehearing on the next available calendar." (Exh. C.) However, on page 85 of the transcript, the transcriber noted in her declaration that she had "transcribed tape(s) which total one in number and cover a total of pages 1 through 84." (Board Transcript "BT".) She received no further tapes for transcription. (Exh. BT at p. 84.)

On December 14, 2004, the BPH[1/] sitting in en banc, adopted the Decision Review Unit's recommendations in full and rescinded the September 2004 suitability decision. (Exh. D.)

On January 27, Petitioner filed a petition of Writ of Habeas Corpus in the Monterey Superior Court challenging the Board of Parole Hearings' disapproval/rescission of its September 2004 finding that he was suitable for parole.

On March 25, 2005, the Court asked the Board for informal

1. Prior to July 1, 2005, the Board was known as the Board Prison Terms.

opposition to the habeas corpus petition. (Exhibit E.)

After receiving the Respondent's opposition,[2] the Court issued an order requiring Respondent to show cause why Petitioner should not be granted the relief sought in his petition. The order included the following statement of issues: "the Court acknowledges the requirements of Penal Code § 3042 and its applicability to Petitioner's claim. However, it is important to note that it was Respondent, rather than Petitioner, who failed to record the 'Decision' portion of the hearing as required by Penal Code § 3042. The informal Response fails to address this apparent inequity." (Order, filed Aug. 23, 2005; Exh. H.) Moreover, in so ruling, the superior court added that "the most equitable solution would be to reschedule the hearing before the same Board members with instructions to adopt the existing transcript from the former hearing and recreate their Decision to recommend parole based on that transcript and their independent recollection." (Id. at p. 2.)

Respondent requested and was given an extension of time to file his return. In the extension, Respondent informed the superior court that a hearing had been rescheduled for October 4, 2005 in front of the same commissioners and "the outcome could render Petitioner's claims moot." (Exhibit I.) Respondent took advantage of the superior court's granting the extension by conducting a de novo hearing, which resulted in a recommendation against parole. (Exhibit X.)

On October 7, 2005, Respondent requested the superior court to advise the parties if it was going to modify the order to

2. See Respondent's Informal Response (Exh. F) and Petitioner's Reply (Exh. G.)

show cause, namely, whether Respondent should still address why Petitioner's hearing should not be heard by the same Board members with instructions to issued a decision recommending parole, and also indicating that no response to the request for an extension to file had been received. (Exhibit W. at p. 2.)

On October 24, 2005, the court issued an order denying Respondent's request that the court modify its Order to Show Cause, and ordered Respondent to file a return on or before November 24, 2005. In response to Respondent's question the court noted, to the extent to which the transcript from the September 24, 2004, hearing was incomplete and the portions of the hearing that were not recorded present evidentiary issues that may be addressed in Respondent's Return. Moreover, given the fact that the transcript contains approximately eighty pages of testimony, the Court remains interested in Respondent's position as to why a de novo hearing (one which appears to have reached a different conclusion) was necessary to correct Respondent's failure to properly record the September 24, 2004, hearing. (Exhibit J.)

On November 28, 2005, Respondent filed a return (Exh. K), and on December 23, 2005, Petitioner filed a denial. (Exh. L.) Subsequently, Petitioner filed a motion to amend the denial and a request for judicial notice to include pages that were inadvertently omitted (Exh. M) and Respondent filed an opposition and objection.

On March 8, 2006 Petitioner filed a response to Respondent's

opposition to request for judicial notice and a response to Respondent's objection. (Exhibit W.)

On June 5, 2006, the court issued an order following the filing of the return and traverse. (Exhibit N.) In the order the court explained that Respondent's reliance on Sections 3041(b), 3041.1, and 3042(b)-(c) for the proposition that the Board's action was proper, is in err. The sections cited by Respondent merely provides a process for the review of a parole hearing decision. The court then added "no mandate is set forth requiring a rehearing where, as here, the recording equipment malfunctions or staff simply neglects to produce all tapes for transcription." (Id. at p. 2.) After pointing out that a "hearing record is sufficient for the purposes of review whether it be made by transcript or written summary," the court admonished that "Respondent failed to analyze or discuss the relevant equities of the matter." (Ibid.) Further, the court found that the petition contained pleading defects which must be corrected, and granted Petitioner leave to amend or supplement his petition by addressing facts and theories relevant to the Board's decision which were not expressly or implicitly raised in the petition. (Id. at p. 5.)

On July 10, 2006, Petitioner filed an amended/supplemental petition. (Exhibit O.)

On August 5, 2006, Respondent filed a request for clarification and, if appropriate, the issuance of an order to show cause. (Exhibit W.)

On November 20, 2006, the court issued an order to show cause directing Respondent to show cause why Petitioner should not be granted the relief sought in his amended/supplemental petition. Moreover, the court once again placed Respondent on notice of its failure to address the relevant equities of the matter. (Exhibit P.)

Respondent was granted an extension of time to file a supplemental return by January 8, 2007. (Exhibit Q.)

On December 29, 2006, the court on its own motion, granted Respondent an extension of time to file a supplemental return within 30 days of January 5, 2007. (Exhibit R.)

On January 8, 2007, Petitioner filed a "Motion to Grant Relief Requested in Petition for Writ of Habeas Corpus." (Exh. S.)

On February 1, 2007,[3/] the court denied Petitioner's "Motion to Grant Relief requested in Petition for Writ of Habeas Corpus." (Exhibit W at p. 3, lns 6-7.)

On February 7, 2007, Respondent filed a return to the amended/supplemental petition. (Exhibit T.)

On March 14, 2007, Petitioner was granted an extension of time to file a supplemental denial on or before March 30, 2007. (Exh. U.) On March 29, 2007 Petitioner filed a supplemental denial.

On April 24, 2007, the court, on its own motion, granted itself an extension of time to issue an order to and including June 1, 2007, because of "complexity of the issues raised." (Exh. V.) On June 1, 2007, the petition was denied. (Exh. W.)

On September 12, 2007, the Sixth Appellate District Court of Appeal denied the petition (Exh. Z.) and the California Supreme Court denied review on Nov. 28, 2007.

3. The Honorable Marla O. Anderson presided over this case from January 2005 until 2007, but was removed prior to rendering a final decision.

SUMMARY OF ARGUMENT

In Greenholtz v. Inmates of Nebraska Penal & Corr. Complex, 442 U.S. 1, 7 (1979) and Board of Pardons v. Allen, 482 U.S. 369 (1987), the United States Supreme Court established in 1979 and reaffirmed in 1987 that "a state's statutory scheme, if it uses mandatory language, creates a presumption that parole release will be granted when or unless certain designated findings are made, and thereby gives rise to a constitutional liberty interest." Id. at 12; Allen, 482 U.S. 377.

In accordance with the United States Supreme Court's decision in Greenholtz and Allen, the California Supreme Court has indicated that California "prisoners possess a protected liberty interest in connection with parole decisions rendered by the Board." See In re Rosenkrantz, 29 Cal.4th 616, 661 (2002).

Here, not only did Petitioner demonstrate a liberty interest in parole release, but also there were other fundamental core due process issues being pursued on appeal: (a) whether the Board's determination was arbitrary and capricious; (b) whether the state court failed to follow the Supreme Court's instructions in Allen holding that parole release will be granted unless certain designated findings are made; and (c) whether the state court failed to follow the Supreme Court's instructions in Hill v. Superintendent, 472 U.S. 445 regarding that there must be some evidence in the record to support the conclusion reached by the board. Nevertheless, relief was denied in this case even though the State Court determined that Petitioner was not responsible for the parole hearing being transcribed (Exh.

W at p. 4) and that the apparent inequity was created by Respondent's neglect to produce all tapes for transcription. (Exh. N at p. 2.) Petitioner was clearly prejudice by Respondent's failure because, if the Board had fulfilled its duty of producing the record, it is reasonably probable, indeed almost certain, that Petitioner would have received a full and fair determination of his parole application in light of the evidence presented to the granting panel. Thus, finalization of the parole grant and his ultimate release from prison.

Moreover, while federal courts have established a long standing practice of paying great deference to the views of those courts who are familiar with the intricacies and trends of local law (Bishop v. Wood, 426 U.S. 341, 246 n. 10 (1976)), the Ninth Circuit warned that the state courts may not interpret their law in such an arbitrary manner that the interpretation is nothing but an evasion of the federal due process requirements. See Peltier v. Wright, 15 F.3d 860, 862 (9th Cir. 1994).

The State's highest court explained "[t]o impose a standard of review that is less stringent than the 'some evidence' test ... would permit the Board to render a decision without any basis in fact." See Rosenkrantz, supra, 29 Cal.4th at p. 657. The Court admonished that "[s]uch a decision would be arbitrary and capricious, thereby depriving the prisoner of due process of law." Id. Accordingly, the state court's interpretation of state and federal law to deny the petition was untenable in light of the evidence and completely eviscerates the federal "some evidence" standard. The writ should be granted directing the State to release Petitioner forthwith.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF RELIEF

I

PETITIONER WAS DEPRIVED DUE PROCESS OF LAW WHEN THE STATE COURT CONCLUDED CONTRARY TO "CLEARLY ESTABLISHED" UNITED STATES SUPREME COURT PRECEDENT THAT PETITIONER HAS NO LIBERTY INTEREST IN PAROLE AND THEN DENIED PETITIONER'S CLAIM WITHOUT ANY EVIDENTIARY SUPPORT IN THE RECORD TENDING TO ESTABLISH THE BOARD OF PAROLE HEARINGS' ALLEGATION THAT THE DECISION PORTION OF THE HEARING COULD NOT BE TRANSCRIBED.

A. Petitioner has a Liberty Interest in Parole Under the Due Process Clause of the United States Constitution.

The Due Process Clause of the Fourteenth Amendment prohibits state action that deprives a person of life, liberty, or property without due process of law. See U.S. Const., 14th Amendment. A person alleging a due process violation must demonstrate deprivation of a constitutionally protected liberty or property interest, and a denial of adequate procedural protection. See Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454, 459-460 (1989); McQuillion v. Duncan, 306 F.3d 895, 900 (9th Cir. 2002). The United States Supreme Court recognizes a federal Due Process liberty interest in parole. Greenholtz, supra, 442 U.S. at p. 7.

California's parole scheme gives rise to a cognizable liberty interest in release on parole because Penal Code section 3041 uses mandatory language that parallels the Nebraska and Montana statutes addressd in Greenholtz and Allen. "Section 3041 of the California Penal Code creates in every inmate a

cognizable liberty interest in parole which is protected by the procedural safeguards of the Due Process Clause." See Biggs v. Terhune, 334 F.3d 910, 914-915.

In the present case, the State court ruled that Petitioner did not have a due process liberty interest in parole because the parole panel's grant was a preliminary decision. (Exh. W at p. 6.) This position is contrary to the weight of authority holding otherwise. See Irons v. Carey, 479 F.3d 658, 662 (9th Cir. 2007). In fact, the Ninth Circuit restated its position in Sass v. California Bd. of Prison Terms, 461 F.3d 1123, 1127 (9th Cir. 2006) that the "liberty interest is created, not upon the grant of a parole date, but upon the incarceration of the inmate." Thus, the State court erroneously deprived Petitioner of due process as defined by Greenholtz and Hill, infra.

Petitioner acknowledges "[t]here is no constitutional or inherent right of a convicted person to be constitutionally released before the expiration of a valid sentence." Greenholtz, supra, 442 U.S. at p. 7. However, "a state's statutory scheme, if it uses mandatory language, 'creates a presumption that parole release will be granted' when or unless certain designated findings are made, and thereby gives rise to a constitutional liberty interest." Allen, supra, 482 U.S. at pp. 377-78; Greenholtz, supra, 442 U.S. at p. 12. Furthermore, when as here, a prisoner has been found suitable for parole, the "parole date heightens that interest." McQuillion, supra, 306 F.3d at p. 903. "[T]he words 'parole granted,' create[s] a specific expectation." See also Rosenkrantz, 29 Cal.4th

at p. 657 (noting that an inmate for whom a parole date has not been set possesses less of an expectation of liberty than one for whom a release date has been set).

The state statutory provision governing parole hearings provides, in part, that "[t]he panel or the board shall set a release date unless it determines that the gravity of the current convicted offense or offenses ... is such that consideration of public safety requires a more lengthy period of incarceration for this individual, and that a parole date, therefore, cannot be fixed ..." See Penal Code § 3041, subd. (b). The Legislature's use of the words "shall" and "unless" makes the provisions mandatory, thus conferring a liberty interest in parole hearings. Allen, supra, 482 U.S. at p. 376; Greenholtz, supra, 442 U.S. at p. 11; Sass, supra, 461 F.3d at pp. 1127-118; see also In re Dannenberg, 34 Cal.4th 1061, 1093 (2005) (explaining that the Legislature recently added further limiting factors to the statute for "the apparent purpose of providing additional protection to indeterminate life inmates ... who have received favorable suitability determinations").

Accordingly, Petitioner strongly contends, contrary to the state court's opinion, it is uniformly settled that he has a constitutionally protected liberty interest in release on parole under the Fourteenth Amendment's due process clause. Greenholtz, 442 U.S. at 7; Allen, 482 U.S. at 373; Biggs, 334 F.3d at 914; Sass, 461 F.3d; Irons, 479 F.3d 662; McQuillion, 306 F.3d at 898, 901-902. Thus, the state court's position runs contrary to "clearly established" federal law and must be rejected.

B. The State Court Violated the "Some Evidence" Standard and Petitioner's Right to Due Process When It Denied Relief Without Any Evidentiary Support in the Record.

In addition, there is a federal constitutional issue going to the sufficiency of the evidence governing administrative hearings. In Hill, 472 U.S. 445, the Supreme Court considered the constitutional validity of such evidence. The Court held the evidence before the board valid, but ruled:

> "This standard is met if there was some evidence from which the conclusion of the administrative tribunal could be deduced. Ascertaining whether this standard is satisfied does not require an examination of the entire record, independent assessment of the credibility of the witnesses, or weighing of the evidence. Instead, the relevant question is whether there is any evidence in the record that could support the conclusion reached by the [parole] board."

id. at pp. 455-456; citations and internal quotation marks omitted; emphasis added. Additionally, "the evidence underlying the board's decision must have some indicia of reliability." McQuillion, supra, 306 F.3d at p. 904.

In assessing whether or not there is "some evidence" to overturn the decision of a parole panel finding an inmate suitable for parole, the State Court is required to consider the statutes and regulations which guide the Board in its review of the granting panel's decision. Rosenkrantz, supra, 29 Cal.4th at p. 658; Dannenberg, supra, 34 Cal.4th at p. 1092; Allen, supra, 482 U.S. at pp. 377-380.

As material, subdivision (b) of Penal Code section 3041 provides:

> "any decision of the parole panel finding an inmate suitable for parole shall become final within 120 days of the hearing ...unless the board finds that

> the panel made an error of law, or that the panel's decision was based on an error of fact, or that new information should be presented to the board, any of which when corrected or considered by the board has a substantial likelihood of resulting in a substantially different decision upon rehearing."

Id. The pertinent Board regulations adopts this view of the statute. See Cal. Code of Regs., ("CCR") tit. 15, § 2042.

In the case at bar, the Board based its 2004 determination of disapproving the panel's finding of suitability "apparently" on an alleged "malfunction of the recording equipment." Exh(s) C & D. Consequently, the Board also concluded that "the decision portion of the hearing cannot be transcribed." Ibid. To support its position the Board cite to Penal Code section 3041(b) and CCR 2042, supra, for the proposition that "an error of law is a basis for disapproving a decision." Exh. K at p. 6, lns 20-25.

Interestingly enough, in spite of making a factual finding that "[n]o mandate is set forth requiring a rehearing where, as here, the recording equipment malfunctions or staff simply neglects to produce all tapes for transcription" (Exh. N at p. 2, lns 12-14), as well as, the acknowledgment of unresolved evidentiary issues,[4/] the State Court made no inquiry into whether there was "some evidence" from which the conclusion of the Board could be deduced as required by Hill. Nor did the State Court make any other inquiry or seek to resolve questions of reliability of the evidence underlying the Board's

4. "Given the fact that the transcript contains approximately eighty pages of testimony, the court remains interested in Respondent's position as to why a de novo hearing (one which appears to have reached a different conclusion) was necessary[.]" Exh J.

claim of malfunctioning recording equipment and its proclaimed inability to transcribe the decision portion of the hearing, as separately required by McQuillion.[5/] Exh. J.

On this record it is hard to conceive that any member of the Board reviewed the recording equipment to determine whether or not the device operated properly. Particularly, where as here, no declarations or any other documentiary evidence has been submitted to the State Court in support of the claim.[6/] To the contrary, Petitioner has shown at several points in the September 2004, hearing transcripts that Deputy Commissioner Rolando Mejia recorded two tape(s) via his statements that: "We're now on the record." BT at p. 1, lns 1-2. At the end of side A of the first tape the Commissioner noted "Okay, we're now on side B of this hearing." BT at p. 43, lns 26-27. Once side B was completed, Commissioner Mejia advised "Okay, we've got to go to another tape." BT at p. 84, lns 3-4. The second tape was then asserted into the recording device and the hearing was continued until its completion. See (Pet. Decl(4)).

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5. Nowhere in the transcriber's declaration does she indicate a problem with transcribing tape(s) or being conferred with concerning the transcription of any tape(s). (BT at p. 85) However, after completely transcribing the tape that contained 84 pages of testimony she noted that "no further tapes were received for transcription." Id. at p. 84.

6. In the declaration of Daniel Moeller, then counsel for the Board, he declares that he reviewed the proposed decision and signed the recommendation on behalf of the Decision Review Unit. He further noted that "[w]hen as [here], a significant portion of the transcript is unable to be transcribed, the hearing is not in accordance with the law." He however, omits any knowledge of who or how it was determined that the decision portion of the transcript was unable to be transcribed, or that the recording equipment malfunctioned. (Exh. K [Decl. of Moeller, attached thereto].) "The only existing written documents relating to Petitioner's 2004, parole suitability hearing" submitted to the State Court were the "BPT-1001 Face Sheet, miscellaneous Decision dated December 20, 2004, and the BPT-1005 Proposed Decision." Exh. W at p. 4, lns 18-21.

Moreover, it has long been recognized that parole release is an "equity-type judgment" (Greenholtz, 442 U.S. at 8; Allen, 482 U.S. at 357) and that when exercising its discretion, the Board's decision must not be "otherwise arbitrary." Hill, supra, 472 U.S. at p. 457; Irons, supra, 479 F.3d at p. 662. Thus, in allowing the Board to justify its actions simply by reciting supposed facts corresponding to the specified factors without determining whether "some evidence" existed to support "cause", the State Court's ruling was not only contrary to "Clearly Established" law as defined by Greenholtz, Allen, and the evidentiary standard articulated by Hill, but also, the State Court deprived Petitioner of due process with respect to affirming a Board decision that was otherwise arbitrary.

Accordingly, the California Supreme Court has ruled that a decision like the one at issue here, is "arbitrary and capricious and, because it affect[s] a protected liberty interest, violate[s] established principles of due process of law." Rosenkrantz, supra, 29 Cal.4th at p. 665. Likewise, the Ninth Circuit has also held that such a decision "violate[s] clearly established federal law because it [allows] a state [to] interfere with a liberty interest in parole without support or in an arbitrary manner." Sass, supra, 461 F.3d at pp. 1128-1129. Consequently, the sole issue before this Court on the "some evidence" standard, is did the Decision Review Unit have some evidence to overturn parole. Petitioner submits the DRU's finding was not supported by "some evidence" and, as such, violated constitutional due process.[7/]

7. Hereafter the DRU is interchangeable with "Board Staff."

II

THE STATE COURT'S ADJUDICATION RESULTED IN A DECISION THAT WAS BASED ON AN UNREASONABLE DETERMINATION OF THE FACTS IN LIGHT OF THE EVIDENCE PRESENTED IN THE STATE COURT PROCEEDING.

It is well-established that "a parole applicant's right to 'due consideration' cannot exist in any practical sense unless there also exist a remedy against their abrogation." See In re Sturm, 11 Cal.3d 258, 268 (1974), citing Marbury v. Madison, 5 U.S. (Cranch) 137, 161-163, 2 L.Ed. 60 (1803). Thus, in accordance with the United States Supreme Court's decision in Marbury, the California Supreme Court has indicated that due process requires that there be "a concomitant right to an available remedy." Sturm, supra, 11 Cal.3d at pp. 268-268.

Furthermore, in the parole context, the state court specifically stated that "the basic remedy to correct arbitrary [Board] action is the writ of habeas corpus." Sturm, supra, 11 Cal.3d at p. 269; see also Rosenkrantz, supra, 29 Cal.4th at p. 655.

Accordingly, when the Board disapproved and rescinded its September 24, 2004, finding that Petitioner was suitable for parole based solely on the fact that the Board lost the decision portion of the transcript from the hearing, Petitioner "prosecuted a writ of habeas corpus" in the state court "to inquire into the cause" (In re Romero, 8 Cal.4th 728, 737 (1994), thus, "provid[ing] the state courts with a 'fair opportunity' to apply legal principles to the facts bearing upon his constitutional claim." Anderson v. Harless, 459 U.S. 4, 6 (1982); Exh. W at p. 1, lns 17-19.

The rules that govern the manner in which state courts must exercise their authority in habeas corpus matters are set forth "in sections 1473 through 1508 of the Penal Code. Romero, supra, 8 Cal.4th at p. 737 (holding that "in exercising this original jurisdiction, the Courts ...'must abide by [these] procedures".).

As material, Penal Code section 1484 provides, as pertinent, that once the order to show cause has been issued and the return has been filed:

> "[t]he Court ... must ... dispose of such case as the justice of the case may require, and ... to do and perform all other acts and things necessary to a full and fair determination of the case."

Id. In In re Harris, 5 Cal.4th 813 (1993) the California Supreme Court explicitly noted that section 1484 supra, is analogous to 28 U.S.C. § 2243 which states that "[t]he court shall summarily hear and determine the facts, and dispose of the matter as law and justice require." Id. at p. 851. The Supreme Court then concluded that "the Penal Code thus contemplates that a court, faced with a meritorious petition for writ of habeas corpus, should consider factors of justice and equity when crafting an appropriate remedy." Ibid; citing, Carafas v. LaVallee, 391 U.S. 234, 239 (1968)(emphasizing the flexible nature of federal habeas remedies under applicable statutes); Andrews v. United States, 373 U.S. 334, 339 (1963)(same).

Here, after it had been determined that Petitioner stated sufficient facts in both his original petition (Exh. W at 1) and his amended/supplemental petition (Exh. W at 2) to establish a prima facie case for relief, the State court denied relief

without requiring Respondent to file a return that "allege facts tending to establish the legality of [Petitioner's] detention [or] ... disput[ing] the factual allegations contained in the petition or traverse." See Bland v. California Dept. of Corrections, 20 F.3d 1469, 1474 (9th Cir. 1994); Exh. W at p. 6; Pet. Decl(1) at para. 8.

Thus, the State court's decision should not be presumed correct because (a) the factual dispute was not resolved in the state court (Pet. Decl(1), para's 3-6); and (b) the material facts were not adequately developed. See Pet. Decl(1) para's 2, 8; Decl(3) para,s 1, 4, 5, 6, & 8; see also Oxborrow v. Eikenberry, 877 F.2d 1395, 1399 (9th Cir. 1989) (noting that federal "deference to the [state] Court is suspended only upon a finding that the Court's interpretation [of state law] is untenable or amounts to a subterfuge to avoid federal review of a constitutional violation.").

Furthermore, in denying relief, the State court specifically noted that it considered the declarations of Debra Levorse and Sanda Maciel and found that Respondent has shown that it would be impossible to recreate the September 24, 2004 panel decision granting parole based on the incomplete transcript and other existing documents."[8/] Exh. W at p. 4, lns 21-24. However, in light of the fact that there is no nexus between the State

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8. The declarations of Debra Levorse and Snadra Maciel were not submitted to address the re-creation of the panel's decision per section 2254 of the California Code of Regulations, but were submitted to address "which forms [were] made available to the commissioner's for use at Petitioner's September 2004 parole suitability hearing." (See Order, filed November 20, 2006 [Exh P] at p. 2).

court's conclusion and any of the statements of the declarants, the court's findings "are indeed erroneous" and "lack even fair support in the record." (Marshall v. Longberger, 459 U.S. 422, 432 (1983); Bland, supra, 20 F.3d at p. 1474. Therefore, the State court's findings must be rejected.

A. 15 CCR § 2254 is the Means to Recreate the Missing Portion of the September 2004 Hearing Transcript.

Section 2254 states that:

> "A record (a verbatim transcript, tape recording or written summary) shall be made of all hearings. The record of the hearing shall include or incorporate by reference the evidence considered, the evidence relied on, and the findings of the hearing panel with supporting reasons."

This view was adopted from the statutory provisions of subdivision (b) of Penal Code 3042 which provide: "The Board of [Parole Hearings] shall record all those hearings and transcribe recordings of those hearings within 30 days of any hearing[,]" and subdivision (c) of the statute which provides, as pertinent, that "the presiding hearing officer shall state his or her findings and supporting reasons on the record."

In its order of June 5, 2006, the State court clearly pointed out Respondent's errs, and distinguished the difference between the statutory right to review a parole grant and the means of recording the entire hearing process. Specifically, the Court concluded that Respondent erred in asserting "that Sections 3041(b), 3041.1, and 3042(b)-(c)" mandates "a rehearing where, as here, the recording equipment malfunctions or staff simply neglects to produce all tapes for transcriptions." Exh.

N at p. 2. Rather, the State court found that the "sections cited by Respondent merely provide a process for review of a grant of parole."[9/] Ibid., lns 11-13.

Moreover, while drawing directly from sections 2254 of the Code of Regulations, the State court explained that "[a] record is sufficient for review whether it be made by transcript or written summary." Ibid., lns 14-15. Notably, the Court placed emphasis on "incorporating by reference the evidence considered, the evidence relied on, and the findings of the hearing panel with supporting reasons." Ibid., lns 16-18.

Thus, in exercising its discretion pursuant to Penal Code section 1484, the State court concluded that "the most equitable solution would be to reschedule the rehearing before the same Board members with instructions to adopt the existing transcript from the former hearing and recreate their Decision to recommend parole based on that transcript and their independent recollection." Ibid., lns 4-7; see also Exh(s) H at p. 2 & P at p. 1.

Accordingly, the means to recreate the September 04' panel's decision was always available to the Board staff through 2254, but they chose not to avail themselves of this remedy and instead, continued to defy the directives of the court. In fact, Respondent has repeatedly failed to "analyze or discuss the

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9. Penal Code section 3041(b) states that "any decision of the parole panel finding an inmate suitable for parole shall become final within 120 days of the date of the hearing. During that period, the board may review the panel's decision," (Dannenberg, supra, 34 Cal.4th at 1092) and 3041.1 of the statute states that "the Governor shall have the power to request review of any decision concerning the grant or denial of parole. (emphasis added.)

equities of the matter" despite many warnings from the State court. See Exh(s) H at p. 1, lns 20-23; J at pp. 1-2; N at p. 2, ln 19. Consequently, "the apparent inequity created by Respondent's interpretation of the law" (Exh N at p. 2, ln 3), further exacerbates the harm done to Petitioner by the Board because it resulted in the time served being in excess of even the "twelve years beyond his minimum eligible parole date of July 31, 1994" noted by the State court. Exh. P at p. 1, lns 16-17.

B. The Missing Portion of the September 04' Hearing Recreated Pursuant to 2254 Regulatory Provisions.

Contrary to the Attorney General's contention that "it would be impossible to recreate the September 24, 2004 Board decision granting parole" (Exh. T at p. 5, lns 16-17), the Board panel did in fact utilized 2254 to recreate the decision portion of the hearing.[10/] See Exh. X. At the hearing, the Panel specifically "incorporat[ed] the summary of the crime from the [existing] transcript" (Id. at pp. 7 & 14; Exh. N at 2, lns 4-5; 15 CCR § 2254) and the documents created or relied upon by the Board, including a May 25, 04' Board Report entailing parole plans (Exh. X at pp. 9-10), post-conviction factors (Id. at p. 11, lns 1-19), and a Psych Report prepared on April 29, 2005, by Dr. Steward. Id. at pp. 11-14; CCR 2254; Exh. N at p. 2, lns 5-6.

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10. Petitioner is citing Exhibit-X for the limited purpose of showing that section 2254 of the Code of Regulations was sufficient to recreate a record, as Ordered by the State court.

However, while the panel noted at the outset of the proceeding that it was "going to in compliance with the court order, go forward with the hearing" (Exh. X at p. 6, ln 27 & p. 7, lns 1-2-), they clearly did not proceed in accordance with that order as they conducted a de novo hearing, as is evident from the admittedly different testimony from the victim (Id. at pp. 28-30), a new argument from a different D.A., and the following exchange between counsel for Petitioner and presiding commissioner Susan Fisher:

> ATTORNEY TARDIFF: I would just like to clarify something. Is the transcript that's being incorporated into this hearing, does that consist of an 84 page transcript from September 24, 2004?
>
> PRESIDING COMMISSIONER FISHER: If my understanding of the court order is correct, that's what they're instructing us to do. What I have specifically incorporated for the purpose of this hearing is the summary of the offense, and I'll leave it to our legal department.
>
> ATTORNEY TARDIFF: All right. We'll I just --
>
> PRESIDING COMMISSIONER FISHER: What the Court is ordering. It does - that's what it looks like to me.
>
> ATTORNEY TARDIFF: 84 pages of a transcript from September of '04?
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> PRESIDING COMMISSIONER FISHER: Yes.

Exh. X at p. 14, lns 10-25.[11/]

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11. The State court questioned the Board's failure to fully comply with its original order of August 23, 2005, and in an interim order directed Respondent to address "why a de novo hearing (one which appears to have reached a different conclusion) was necessary to correct Respondent's failure to properly record the September 24, 2004 hearing." (Exh. J at p. 1, lns 23-24 & p. 2, lns 1-2.)

Petitioner strongly contends, had the Board followed the State court's original order and provided "the same [panel] members with instructions to issue a Decision recommending parole" (Exh. H at p. 2), it would have cured the due process inequity created by Respondent and made available to both the public (Penal Code § 3042(b)) and the Governor (Penal Code § 3041.1) for review the Panel's decision including its findings and reasons supporting the decision. Penal Code § 3042(c). In addition, it would have preserved Petitioner's right to "due consideration" (In re Sturm, 11 Cal.3d 258, 268 (1974)), and his interest in being paroled "when the findings prerequisites to release [were] made." Allen, supra, 482 U.S. at p. 381; Rosenkrantz, supra, 29 Cal.4th at p. 654.

Finally, in denying relief, the State court noted that "a rehearing was held and that "the same panel concluded that public safety concerns required finding Petitioner unsuitable for parole." Exh. W at p. 6, lns 10-12. Not only are these alleged facts indeed erroneous, because nowhere in the rehearing transcript does the panel expressly states that Petitioner is a threat to public safety (Exh. X at pp. 31-33), but the denial is in conflict with California law which dictates that "the Board must apply detailed standards when evaluating whether an individual inmate is unsuitable for parole on public safety grounds." Dannenberg, supra, 34 Cal.4th at 1095, fn 16.[12/]

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12. The State court's denial fails to acknowledge that the hearing results were in conflict with the court order instructing the Board "to adopt the existing transcript from the former hearing and recreate their decision to recommend parole based on that transcript and their independent recollection" (Exh. H at p. 2.), as well as, contrary to the evidence indicating that Dixon was shot by "both Canado and [Petitioner]." (BT at 14:22-25; Pet. Decl(2)).

III

PETITIONER WAS DEPRIVED OF HIS FIFTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS WHEN THE BOARD DISAPPROVED AND RESCINDED ITS SEPTEMBER 24, 2004 FINDING THAT HE WAS SUITABLE FOR PAROLE BASED SOLELY ON THE FACT THAT THE BOARD LOST THE DECISION PORTION OF THE TRANSCRIPT FROM THE HEARING.

As demonstrated, the mandatory language of subdivision (b) of Penal Code Section 3041 imposes an affirmative obligation to grant parole, creating a legally cognizable liberty interest in parole and a presumption that parole release will be granted if certain conditions are met. McQuillion, 306 F.3d at pp. 901-902; Biggs, 334 F.3d at p. 915. Moreover, once parole has been granted, California law provides that the "decision finding an inmate suitable for parole is final unless overturned by the full Board within 120 days [for 'good cause']." Penal Code § 3041(b); Dannenberg, 34 Cal.4th at p. 1092.

"Good Cause" for disapproval includes conduct enumerated in section 2042 of the California Code of Regulations, which states "(1) the panel made an error of law; (2) the panel's decision was based on an error of fact; or (3) that new information should be presented to the board, any of which when corrected or considered by the board has a substantial likelihood of resulting in a substantially different decision upon rehearing."[13/] Dannenberg, 34 Cal.4th at 1092 (referencing amended Penal Code § 3041(b)). Furthermore, under Board statutes and regulations, the Board's findings had to be based upon the law the Panel was required

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13. Black's Law Dictionary (cent. ed. 1991) most pertinently defines "error of law" as "an error of the [panel] in applying the law to the case..." Id., at p. 377, col. 2; see also Apprendi v. New Jersey, 530 U.S. 466, 492 fn. 17 (2002), citing approvingly to "most common definitions" of Black's Law Dictionary.

to use in finding Petitioner suitable for parole. Rosenkrantz, 29 Cal.4th at pp. 654-655; 15 CCR §§ 280, 2281(a)-(d), 2282(c).

A. The September 2004 Hearing Panel's Decision.

The 2004 Panel reached its finding of suitability for parole after an approximately three-hour hearing. At the hearing the Panel noted that the proceedings were being conducted pursuant to Penal Code Sections 3041 and 3042 and the Rules and Regulations of the Board of [Parole Hearings] governing parole consideration hearings for life inmates. BT at p. 5. The Panel then addressed the particulars of the governing criteria and guidelines, noting that:

> "the purpose of the hearing today is to consider again the crimes that you were committed for, your prior criminal and social history, and your behavior and programming since your commitment offense. We have had the opportunity to review your files and your prior transcripts, and we'll give you the opportunity to make any corrections that you need to today, all right. [¶]We're going to be deciding today as to your suitability. If we do find you suitable today we'll explain to you also today what the length of your confinement will be. [¶]Prior to recessing to deliberate we're going to give the District Attorney and your attorney and you the opportunity to make a statement about your suitability. And then once you've done that we'll allow Mr. Dixon to make his statement. After that is completed we will have everyone leave the room. We'll turn off the camera here and we'll deliberate. As soon as we have a decision we'll bring you all back in, okay. [¶]The California Code of Regulations state that regardless of the time served a life inmate shall be found unsuitable for and denied parole if in the judgment of the Panel the inmate would pose an unreasonable risk of danger to society if released."

Id. at pp. 5-6. The Panel then discussed with Petitioner his entitlement to "a timely notice of the hearing, the right to review [his] central file, the right to present relevant documents, [and] the right to an impartial panel." Id. at pp. 6-7. Prior to explaining the appeals process, the Panel stated "we're going to give you a written copy today of our tentative

decision," and further advised that the decision will become final within 120 days. In addition, the Panel conveyed to Petitioner that "a copy of the decision and transcript will be set to you." BT at p. 7. Thus, the granting Panel explicitly stated what it intended to discuss, and a review of the transcript provides undisputed proof of what it had discussed. At the conclusion of the hearing, the Panel found Petitioner suitable for parole and no longer posing an unreasonable risk or danger to public safety. The Panel used its regulatory matrix (15 CCR 2282(c)) for setting the based term at 180 months (15 yrs) and calculated the total period of confinement at 188 months (15 yrs, 8 mos). Petitioner was then give a copy of the proposed Decision with the affixation "PAROLE GRANTED do not release pending decision review" printed thereupon. See Exh. A; Pet. Decl(4) at para(s) 3, 4, 6 & 7.

In Rosenkrantz, the California Supreme Court reaffirmed its position that the statutes and regulations cited by the Panel are indeed the law governing parole board decisions, and that once the Board has "take[n] into account all pertinent information and input about a particular case" and determined based upon the "detailed standards" that the inmate no longer poses a threat to public safety," the "Board must grant parole." 29 Cal.4th at pp. 653-54; Dannenberg, 34 Cal.4th at 1078-80, 1098; Allen, 482 U.S. at 377-78.

Accordingly, the relevant question here, is whether there is any evidence to substantiate the Board's ultimate inference that the Panel made an error of law, and if so, did "the authority make it clear that it would have reached the same decision absent the error." See Dannenberg, supra, 34 Cal.4th at p. 682 (holding

that "[a] reviewing court may uphold a parole authority's decision, despite a flaw in its findings, if the authority has made it clear it would have reached the same decision even absent the error"); Rosenkrantz, supra, 29 Cal.4th at p. 682 ("same"). The record in this case simply will not permit such a conclusion. See Pet. Decl(4) at para 3.

Conversely, on this record, the "error of law" basis for good cause on which the Decision Review Unit ("DRU") and the En Banc Board purported to have acted, irrefutably reflects in actual fact, that the "[disapproval and] rescission was an abuse of discretion" (In re Powell, 45 Cal.3d 894, 904 (1988)) because neither the DRU or the Board operated within the limiting construction of the law, nor avail themselves of mandated available remedies, and both "acted 'without information [and] on mere personal caprice.'" Powell, supra, 45 Cal.3d at p. 904, quoting In re Spence, 36 Cal.App.3d 636, 639-640 (1974).

B. The Board Staff's Review of the September 04' Hearing Transcript and Finding of Suitability.

When "reviewing" a decision rendered at a parole board hearing, the law dictated that "the board staff shall review the information available to the panel that made the decision" (15 CCR § 2042) and must also "consult with the commissioners who conducted the parole consideration hearing." Dannenberg, supra, 34 Cal.4th at p. 1092; Penal Code § 3041(b). Moreover, due process of law requires the Board's staff to observe the statutory procedural "safeguards" which protects "against serious risk of errors." Greenholtz, supra, 442 U.S. at p. 15.

However, instead of fulfilling its duty of reviewing the information made available to the September 04' hearing Panel members that made the decision, the Board staff overturned the Panel's finding of suitability based on piecemeal information and without ever conferring with the Panel to determine what happen to the second tape. BT at p. 84; Exh(s) C & D.

Petitioner strongly contends, after alleging a problem concerning the recording equipment and tapes, the board staff had a responsibility to consult not only with the commissioners who presided over the case,[14] but also other staff members to establish the chain of custody regarding the missing tape. Particularly, since the tape in question contains "a synthesis of record facts"[15] that the Panel personally observed and filtered through its experience leading to its decision to grant parole. Greenholtz, supra, 442 U.S. at p. 8; Allen, 482 U.S. at p. 375.

Moreover, had the Board staff acted with due diligence and consulted with the commissioners and other personnel handling the records in this case,[16] the information complained of could have been recovered, and/or in lieu of its recovery, the "decision portion" of the hearing was certainly obtainable through consultation given that (1) the transcript was completed

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14. Susan Fisher (Presiding) and Rolando Mejia (Deputy).

15. Closing statements of Petitioner and his attorney, the victim and the deputy district attorney.

16. Including Sandra Maciel (Staff Service Manger I, BPH-Decision Processing and Scheduling Unit); Debra Levorse (Classification and Parole Representative Records Department); and Patricia Ricci (Transcriber of the hearing tape(s) which totaled one in number "Oct. 15, 2004").

approximately twenty-one days after the hearing,[17] thus making it possible to document its findings with supporting reasons; and (2) the Board staff had before it the evidence considered and relied on by the panel in the form of an 84 page transcript.[18]

Noteworthy, under both state and federal law, the Board's reasons, in and of themselves, violates due process because they fail to strike "a balance between the interest of [Petitioner] and of the public" (Powell, supra, 48 Cal.3d at 902), and also runs contrary to "a predictive judgment as to what is best for both [Petitioner] and for the community." Greenholzt, supra, 442 U.S. at 8; Allen, supra, 482 U.S. at p. 357.

As is evident by the record, the Board's decision to overturn the Panel's finding of suitability based solely on the fact that the Board's staff lost the decision portion of the transcript from the hearing contravened the due process clause because it had nothing to do with public safety or any other statutory criteria for denying parole. In Allen, the Supreme Court made it clear that once the statutory requirements for parole have been met, "the Board shall release the inmate." 482 U.S. at p. 381. Here, Petitioner overcame the legislative

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17. While "the demeanor of witnesses and their manner of testifying" (In re Hitchings, 6 Cal.4th 97, 109 (1993)) was still relatively fresh in the minds of the commissioners. see also Greenholtz, supra, 442 U.S. at p. 8 (referring to the decisionmaker's personal observation filtered through his or her experience.).

18. Other evidence before the Board staff were: original letters from victims (BT at 8), the 2002 Board Report (Id. at 10), the 2003 Psych Report (Id. at 42), Petitioner's parole plans (Id. at 27), letters of support for Petitioner (Id. at 29), the Central-file (Id. at 35), Petitioner's disciplinary history (Id. at 41); and the Appellate Court Opinion. Id. at 53.

expressed public safety exception of Penal Code section 3042, subdivision (b) when the granting Panel found him suitable for parole, and there "is nothing in the record" suggesting that he had engaged in any conduct reflecting adversely upon his parole grant.

Accordingly, Petitioner strongly contends, that even in applying permissible standards, the Board "cannot [deny parole] when [as here,] there is no basis for their finding[s]." See Rosenkrantz, supra, 29 Cal.4th at p. 667, quoting Schware v. Board of Examiners, 353 U.S. 232, 239 (1957); see also Hill, 472 U.S. at p. 457; Irons, supra, 479 F.3d at p. 662. Moreover, it has been noted that when no rational connection has been made between the Board's decision and the applicable criteria, the decision has been held to be "arbitrary and capricious, thereby depriving the prisoner of due process of law." Rosenkrantz, supra, 29 Cal.4th at p. 657, citing Powell, supra, 45 Cal.3d at p. 904; Sass, supra, 461 F.3d at p. 1129.

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CONCLUSION

"The touchstone of due process is protection of the individual against arbitrary action of government." Wolff v. McDonnell, 418 U.S. 539, 558 (1974), citing Dent v. West Virginia, 129 U.S. 114 (1889). The Board's failure to point to any evidence in the record that would support the Decision Review Unit's conclusion, and ultimately the disapproval and rescission of Petitioner's parole grant "infringed on [Petitioner's] cognizable liberty interest that has been 'clearly established' by the United States Supreme Court" (Board of Pardons v. Dumchat, 452 U.S. 458, 467 (1981); Greenholtz, supra, 442 U.S. at 12; Allen, 482 U.S. at 377; Sass, supra, 461 F.3d at 1129) and violated his constitutional right to due process.

Accordingly, the State Court's decision was contrary to "clearly established" law and was unreasonable in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254; Early v. Packer, 537 U.S. 3, 8 (2002) (quoting Williams v. Taylor, 529 U.S. 362, 412-413 (2000). Petitioner therefore, request this Court to grant the petition for writ of habeas corpus and Order Respondent to release him forthwith.[19]

Dated: 12/4/2007

Respectfully submitted,

Frederick Lee Baker
Petitioner in Pro Se

19. Under Federal Rule of Evidence 201, Petitioner request this Court to take judicial notice of its file in (Related) Habeas Corpus C-04-3753.

Court of Appeal, Sixth Appellate District - No. H031782

S156499

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re FRED L. BAKER on Habeas Corpus

The petition for review is denied.

SUPREME COURT
FILED

NOV 28 2007

Frederick K. Ohlrich Clerk

Deputy

GEORGE

Chief Justice

Appendix I.